United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1056

To be argued by

MARTIN JAY SIEGEL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B/S

UNITED STATES OF AMERICA,

Appellee

-against-

Docket No. 75-1056

AMPARO JIMINES,

Appellant

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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AMPARO JIMINES,

Appellant.

ISSUES PRESENTED

1) Was the admission of a pre-trial statement made by the appellant violative of her constitutional rights?

2) Did the trial court err in failing to dismiss counts 1, 2 and 3 against the appellant at the conclusion of the prosecution's case?

STATEMENT PURSUANT TO RULE 28(3)

AMPARO JIMINES appeals from a judgment of the United States District Court for the Southern District of New York, rendered on February 13, 1975, convicting her after trial (CONNOR, J. and a jury) of Conspiracy to violate the Federal Narcotics Laws, and two counts of possession of cocaine with intent to distribute. Ms. Jimines was sentenced to a term

of one year in prison on counts 1 and 3. On count 2 she was sentenced to probation. All sentences to run concurrently.

Amparo Jimines was indicted together with Rosa Martinez, aka 'Marta', Luis Roman, Ricardo Gomez-Martinez and Luz Echevery. Bench warrents were issued against Ms. Martinez, Mr. Roman and Mr. Martinez. Prior to trial the government dismissed the indictment as against Ms. Echevery.

STATEMENT OF THE FACTS.

A government paid informant, Mr. Ramon Acevedo, of dubious reliability, testified that during the late summer of 1974 he met the defendant Rosa Martinez aka Marta in the lobby of the Hotel Orleans (T-95)*. She asked him whether he needed any 'merchandise', which was meant to mean illicit narcotics. He stated that he did not need any then, but he would contact her if the need arose. Marta wrote her address on a peice of paper and gave it to him.

Subsequent to this meeting, Mr. Acevedo had an occasion to meet Marta on the corner of 96th and Broadway. She was then in the company of the appellant, Ms. Amparo Jimines. Marta advised Acevedo that if he needed anything, meaning narcotics, to contact her. Marta gave Acevedo her new apartment number which was at the same previous street address (T-99)*. Although appellant Jimines was present when this conversation occurred, there was no testimony that she in any way participated in it. A similar meeting took place within the same week again with Jimines present, but the appellant, although present, took no part in the narcotics negotiations. (T-100)*

Approximately three days later Acevedo and an

*T represents page numbers of the official transcript.

unnamed friend went to purchase 'two bags of marijuana', at Marta's apartment. Some days after that transaction occurred, Marta and Acevedo met in the former's apartment and had a conversation about the sale of 1/2 of an ounce of cocaine. There ensued detailed arrangements as to price and quality. Although appellant was present, again she took no part in the discussion of narcotics. (104, 163)

A period of time elapsed after this meeting, whose duration Mr. Acevedo cannot recall, when he returned to the apartment to purchase a sample of cocaine.

The alleged facts in that transaction are as follows:

Mr. Acevedo went to the subject apartment where Marta and the appellant were then located. During a conversation in the kitchen where all three were present, Marta directed Amparo Jimines to go to the refrigerator and take out some cocaine and give it to Acevedo. Mr. Acevedo then gave Marta $25.00.

Mr. Acevedo testified that after he left Marta's apartment he turned the sample over to Agent Kobell of the DEA. The sample was introduced at trial as government's exhibit two. (111)

The next day at about four in the afternoon, Acevedo returned to the apartment to make the 'big deal'.

Upon entering the apartment he had a conversation as to the arrival of the shipment of cocaine. Marta told him that it had not arrived but was expected. Mr. Acevedo then exited the apartment.

He returned at about 7:30 in the evening, only this time equipped with a Kehl body recording device (T-114). Upon his entry into the apartment he observed Marta, the appellant, two males and one female. Marta told him that the merchandise was near and that he should return with his customer.

After Acevedo left, the two males and female were observed by surveillance officers leaving the premises and driving away.

At 9 p.m. Acevedo and Agent Simpson of the DEA went to the subject apartment to 'make the deal'. Acevedo was still wearing the body recording device. Marta, Agent Simpson and Acevedo discussed the proposed narcotics transaction in minute detail. Agent Simpson testified that all the conversations and negotiations were exclusively with Marta (T-333). Marta indicated to Simpson and Acevedo that the long awaited cocaine would be arriving shortly. Appellant was present in the apartment, but as always, took no part in the discussions or negotiations.

Shortly thereafter, the three individuals returned and went into the kitchen with Marta. Appellant was at the bedroom window and did not enter the kitchen (T-139). When Marta returned from the kitchen she had the 1/8 of an ounce of cocaine and showed it to Agent Simpson. It could be inferred that the three individuals brought the narcotics with them upon their return to the apartment. This cocaine comprised count 3 of the indictment and was introduced as evidence against the appellant.

Agent Simpson examined the cocaine. He then stated that he wanted to go downstairs and pick up the money. As he was about to leave the premises other agents rushed in and arrested the occupants.

Subsequent to the arrest of the appellant she was interviewed by Assistant United States Attorney Daniel Pykett, in the presence of Agent Kobell. The prosecution contended that after being fully advised of her constitutional rights she stated that she lived at 345 West 53rd Street and was at the scene of the alleged crime for the purpose of attending a party at Carlos Ortiz's apartment. This statement was admitted into evidence over the strenuous objections of the defense counsel.

At the conclusion of the prosecution's case, the appellant moved to dismiss all three counts of the indictment. Upon that motion being denied, Ms. Jimines rested on the presumption of innocence afforded every defendant under our Criminal Justice System. She was found guilty as charged.

POINT I

WAS THE ADMISSION OF A PRE-TRIAL STATEMENT MADE BY THE APPELLANT VIOLATIVE OF HER CONSTITUTIONAL RIGHTS?

The court erred in admitting the statement made by the appellant to an Assistant United States Attorney at the time of her post arrest interview.

After Ms. Jimines was arrested she was taken to the office of AUSA Daniel Pykett, esq., to be interviewed prior to being taken before the United States magistrate for arraignment. At a hearing outside the presence of the jury, Mr. Pykett testified that before he commenced questioning the appellant he advised her of the Miranda rights. These warnings were given through an interpreter, Ms. Norma Seltzer since appellant could not speak nor understand English. Appellant's counsel contends that these warnings fell short of the stringent criteria outlined in the landmark decision of Miranda v. Arizona 384 U.S. 436 (1966). There is testimony from Mr. Pykett that he read from the U.S. Attorney's Interview sheet and made certain notes regarding her response. (Appendix, Page 6)(223) He stated that after each question was translated to appellant she did not respond verbally, but nodded her head.

The key issue involved in this point is that when Mr. Pykett stated he was an AUSA he did not explain to her what that was. (226) The appellant testified as to her rural

background, limited education and that she had never spoken nor dealt with an attorney prior to speaking with Mr. Pykett. In addition, Mr. Pykett further stated that he did not explain to her what an attorney was. (220) Ms. Jimines also testified that she was under the impression that Mr. Pykett was a friend or representative of hers. It is therefore argued with much force that she was not adequately advised of her rights under Miranda.

Where interrogation takes place outside the presence of counsel, there is heavy burden placed on the government to demonstrate that the defendant knowingly and intelligently waived her right to counsel. Miranda, supra, U.S. v. Delporte 483 F 2nd 1309 (2nd Cir. 1974). For the waiver of counsel to be effective, it must be a knowing and intelligent waiver done voluntarily and in the absence of pressure. The accused must know full well what she is doing, with the intended consequences. U.S. v. Tafoya 459 F 2nd 424 (10th Cir. 1972). To determine if the waiver was voluntary and of one's own free will, the totality of the circumstances of the accused and the details of the interrogation must be carefully examined. Schneckloth v. Bustamonte 412 U.S. 218 (1973)

It is course conceded that none of the "strong armed and totalitarian' events carefully detailed in the

Powell v. Alabama 287 U.S. 45 (1932) and Johnson v. Zerbst 304 U.S. 458 (1938) occurred in the instant action.

However, it is clear from the testimony before the court that the appellant was advised of certain rights but had no conception what they meant. It appears that it was as if Mr. Pykett read them to a stone wall. In order for a Miranda warning to be valid, the consequences and effect of waiving counsel must be driven home to the defendant. U.S. v. Frazier 476 F 2nd 891 (CADC 1973).

Ms. Jimines, a product of a farming community in Puerto Rico, with little formal education, (240) recently on the mainland and never having had any dealings with attorneys certainly could not in full grasp the import of the statement read to her by Mr. Pykett. As Ms. Jimines testified, when Mr. Pykett told her that he was an AUSA it meant to her that he was a friend and not a prosecutor (234-7). In the Frazier case, supra, Judge Bazelon stressed the need of determining not only by word but by act if the accused has fully grasped the full import of the Miranda safeguards. The old adage of actions speak louder than words certainly applies when one is looking for proof of an intelligent waiver of counsel. U.S. v. Cooper 490 F 2nd 1069 (CADC 1974), U.S. v. Vigo 487 F 2nd 295 (2nd Cir. 1973)

The risk of using the statement and its danger on appeal was driven home to the government by the trial court. (252-3) Should the court in its ultimate wisdom decide to reverse this case, it should do so with the knowledge that the government knew full well the inherent dangers it was taking by using the statement at trial. Counsel for appellant argues that the government has failed to sustain its burden that she effectively waived her rights to counsel and made a statement of her own free will.

The statement made by the appellant, was highly incriminating as conceded by the government's counsel (251). It was to the effect that she lived at a location different from that where she actually resided, and therefore lied to the arresting officers. The untold effect this had on the jury's deliberations seriously affected appellant's ability to receive a fair and impartial trial.

It is urged therefore that this case in its entirety be reversed.

POINT II

DID THE TRIAL COURT ERR IN FAILING TO DISMISS COUNTS 1, 2 AND 3 AGAINST THE APPELLANT AT THE CONCLUSION OF THE PROSECUTION'S CASE?

A) SUFFICIENCY OF THE EVIDENCE

In determining whether the evidence in a particular criminal case is sufficient to sustain a finding of guilty, it must be viewed in a light most favorable to the government. Glasser v. U.S., 315 U.S. 60 (1942), U.S. v. Tutino 269 F 2nd 488 (2nd cir. 1959). Examining the evidence adduced at trial in that light, we see that the appellant's contact with the conspiracy was just one of mere presence. This is true whether it be in the conversation between Marta and Acevedo, or the former and Agent Simpson. Ms. Jimines was present when negotiations took place, but both government participants testified without equivocation that she took no part in them. (163, 333)

The law in this area has become so settled as to be considered hornbook law. Mere presence at the scene of a crime or meeting of co-conspirators does not automatically entangle one into the nefarious web of a criminal conspiracy. U.S. v. Terrell 474 F 2nd 872 (2nd cir. 1973), U.S. v. Cirillo 499 F 2nd 872 (2nd cir. 1974), DiRi v. U.S. 332 U.S. 581 (1974).

It is clear that appellant Jimines's connection with the conspiracy was one of a mere observer. The record is

barren of a scintilla of proof or speculation that she had a stake, role or interest in the goals or outcome of the conspiracy. All through the record the impression of the appellant is one on the outside looking in. The government may argue that appellant was present when most of the conversations and negotiations concerning narcotics took place and that it may be inferred she knew what was occurring. This court is aware that even accepting the proposed government allegation as gospel, still it is insufficient to make one a co-conspirator.

There appears to be some dubious testimony by Acevedo that on one occasion, appellant, at the request of Marta, went to the refrigerator and took some cocaine out and gave it to him. Acevedo further stated that he then gave Marta $25.00. This simple act, assuming arguendo, if it is to be believed, then it is still not sufficient to promote appellant to the status of a fullfledged conspirator. This one simple and miniscule involvement with the conspiracy would bring her within the single transaction rule.

The law is legion throughout the land on this point: than when an individual engages in a single act or transaction with a member of a conspiracy, he is not then automatically a member of that conspiracy. U.S. v. Reina 242 F 2nd 302 (2nd

Cir. 1957), U.S. v. Aviles 274 2nd 179 (2nd Cir. 1960), U.S. v. Denoia 451 F 2nd 979 (2nd Cir. 1971). The record is clear on its face that appellant's sole connection, if to be believed, with the conspiracy appears to have been that one act act of passing a small amount of cocaine to Acevedo. It is argued that without more proof, the single transaction rule would apply and count 1 should have been dismissed.

B) GOVERNMENT FAILED TO SHOW THAT APPELLANT POSSESSED 150 GRAMS OF COCAINE.

The proof failed to show that in any way appellant possessed the 150 grams of cocaine which is charged in count 3. The record is clear from the time Agent Simpson and Acevedo entered the apartment until the remaining agents stormed the premises, appellant's position was one of looking out the window without taking any part in the negotiations or for that matter entering the kitchen with the other individuals present at that time. As the record indicates when the three individuals returned to the apartment, they went into the kitchen to be immediately joined by Marta. From that foursome, appeared the 150 grams of cocaine. Appellant neither spoke with nor had any contact with them at all.

The appellee may argue before the high court that

the reason appellant was standing by the window was because she was a "lookout". This argument is meritless and must fail. To advance a position that one who looks out a window and watches the world go by reflects nefarious and evil conduct is of course, unreasonable. There is nothing before this court which could lead one to that illogical conclusion and it must be disregarded.

The theory of constructive possession against appellant in count 3 must fail since this record is absent of any indicia of possession, ownership or control over the cocaine. U.S. v. Cornish 491 F 2nd 20 (1st Cir. 1974), U.S. v. Purvin 486 F 2nd 1363 (2nd Cir. 1973), U.S. v. Wright 466 F 2nd 1256 (2nd Cir. 1972).

In the Cornish case supra, the government proved that appellant was a party to a conversation about the narcotics where he conceded partial ownership. Although he was never seen in actual possesssion, the fact that he acknowledged possession was deemed sufficient. In the instant case, we have no statement by the appellant, no observation was made of her with the narcotics or for that matter any other connection with the narcotics.

It is alleged that as a matter of law this honorable court should dismiss count 3.

C. TAINT

The appellant advances the argument that if this court should dismiss counts 1 and 3 of the indictment for the reasoning advanced in this brief or for any other reason, then it is urged to remand count 2 for a retrial.

The taint created by the jury's being unfairly allowed to consider counts 1 and 3 unduly prejudiced the appellant in their consideration of count 2. The appellant at a trial by jury of her peers, is entitled to have the evidence in each count considered separate and apart. When the jury is to consider proper as well as extraneous and prejudicial matters equally, then a criminal defendant's case cannot be fairly determined. To ask a jury of laymen to delve and surgically separate the evidence is more than can be expected. It is conceded that the defendant is entitled to a fair but not a perfect trial. U.S. v. Mitchell, et al. USDC for the District of Columbia, opinion of Sirica, J., October, 1974. However, in the case at bar, the appellant had neither. The consideration of all counts by the jury overstepped the boundaries of propriety and merits reconsideration at a new trial.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED WITH INSTRUCTIONS TO DISMISS THE INDICTMENT WITH PREJUDICE.

Respectfully submitted,

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